

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

W. A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the)
TRUSTEE FOR NATURAL RESOURCES)
FOR THE STATE OF OKLAHOMA,)
Plaintiff,)
vs.) 4:05-CV-00329-TCK-SAJ
TYSON FOODS, INC., et al,)
Defendants.)

VOLUME I OF THE VIDEOTAPED

30(b)(6) DEPOSITION OF TEENA GUNTER, produced
as a witness on behalf of the Defendants in the
above styled and numbered cause, taken on the 27th
day of August, 2008, in the City of Oklahoma City,
County of Oklahoma, State of Oklahoma, before me,
Lisa A. Steinmeyer, a Certified Shorthand Reporter,
duly certified under and by virtue of the laws of
the State of Oklahoma.

Exhibit 6

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1 facilities that are permitted by them.

2 Q Okay. Is there any other arrangement similar
3 to that between ODAFF and any federal agency that
4 would be related to the land application of poultry
5 litter or water quality?

11:51AM

6 A Wait.

7 MR. LENNINGTON: Object to the form.

8 Q First, land application of litter.

9 A You expanded that dramatically. What do you
10 want to know?

11:51AM

11 Q Any arrangements with ODAFF and any federal
12 agency regarding land application of litter?

13 A We have a grant that we draft plans for the
14 USDA NRCS.

15 Q Okay. What does that grant entail?

11:52AM

16 A We're paid a -- or some of our contract folks
17 are paid -- the department is paid a fee for each
18 waste management plan that we produce for NRCS.

19 They are not department product. They are -- we are
20 the technical service provider essentially in that
21 arrangement.

11:52AM

22 Q Okay. ODAFF is writing animal waste
23 management plans for NRCS?

24 A Yes.

25 Q Okay, and that's covered by a grant?

11:52AM

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1 A The grant is -- pays ODAFF a particular amount
2 per plan.

3 Q Okay, and what body of law requires these
4 animal management or animal waste management plans?

5 A Well, our -- the Poultry Act requires a 11:53AM
6 facility to have the waste management plan, as well
7 as the CAFO Act would, and the applicator does in
8 some cases require one.

9 Q Okay. So the federal grant is paying ODAFF to
10 write plans under the various acts that require an 11:53AM
11 animal waste management plan?

12 A No.

13 Q No?

14 A No, they're not writing -- we're strictly
15 writing them for NRCS as though we were an NRCS 11:53AM
16 field office in that respect.

17 Q Okay, but the plans are for Oklahoma?

18 A They are not for us. They are for NRCS and
19 the producer.

20 Q Okay. The plans are for NRCS and the 11:54AM
21 producer, the poultry producer?

22 A Yes.

23 Q Okay. In satisfaction of Oklahoma law,
24 whether it be the CAFO law or the Registered Poultry
25 Feeding Act; is that correct? 11:54AM

1 A That wouldn't be the only reason that they
2 might obtain a plan.

3 Q Okay. There would be people out there that
4 have an animal waste management plan that aren't
5 subject to those two state laws?

11:54AM

6 A Yes.

7 Q Okay, and who would those people be?

8 A NRCS for many of their cost share programs,
9 for many of their relative programs would require
10 you to have a plan to be able to take part in those
11 programs.

11:54AM

12 Q Okay.

13 A And that could be any producer that takes part
14 in those programs.

15 Q Okay, and those could be anywhere statewide?

11:54AM

16 A Yes.

17 Q Okay. Apart from this grant program, is there
18 any other relationship between ODAFF and a federal
19 agency regarding land application of litter?

20 A Not to my knowledge.

11:55AM

21 Q And I guess my question -- and maybe we can
22 narrow it down. Does ODAFF have any responsibility
23 under any of the federal environmental laws?

24 A ODAFF in general?

25 Q ODAFF.

11:55AM

1 Oklahoma, and she's testifying as the State of
2 Oklahoma, yes. I think that's appropriate. If you
3 ask what's included in the definition of poultry
4 waste, it includes the term any other waste that she
5 -- as part of her answer, I think it's fair to allow
6 her to talk about what's in an expert report that
7 was prepared by the State of Oklahoma. I think it's
8 fair to allow her to answer that way. That's what
9 she was trying to do before you interrupted her.

03:49PM

10 Q Has the Department of Agriculture ever brought
11 any kind of enforcement action or investigated a
12 complaint based upon one of these expert reports
13 that we've talked about earlier today?

03:50PM

14 A Well, no. That would be inappropriate.

15 Q Thank you. Okay. Is there anything in
16 Oklahoma law that defines these other factors that
17 are inherent within the poultry waste definition?

03:50PM

18 A Repeat it.

19 Q It's the same question that I asked. Is there
20 anything in Oklahoma law that defines these other
21 factors that are inherent in the definition of
22 poultry waste? I mean, is there something out
23 there --

03:50PM

24 A I mean, poultry waste is what it is, and it is
25 made up of numerous constituents. Some have been

03:50PM

1 specifically identified in the statute as areas of
2 concern. There are numerous other things in that
3 that may be areas of concern as well that we just
4 don't have a statutory mechanism to deal with them
5 at this time or we don't have it in this Act, but
6 there are numerous other provisions out there that
7 can cover that kind of stuff, but I can't talk about
8 poultry waste and not talk about nitrogen and
9 phosphorus and all the other constituents associated
10 with it because they're all part of it.

03:51PM

03:51PM

11 Q Okay. I'm asking you to identify these other
12 specific provisions that you just referenced, and
13 that's not an expert report. What is it that
14 you're --

15 A Are you saying water quality standards where
16 we see excess arsenic, for example, would be a
17 potential one? There's excess arsenic identified.
18 Well, that could be a part of poultry waste if we've
19 traced it to that. If that's one of the
20 constituents on the list, then that's part of
21 poultry waste.

03:51PM

03:51PM

22 Q Okay.

23 A So water quality standards can address there,
24 and there's other places.

25 Q Okay. So you're saying that water quality

03:52PM

1 standards are inherent in this definition of poultry
2 waste?

3 A I'm saying that you asked me what's poultry
4 waste, and we have a laundry list of items and the
5 items -- and it's -- it makes no sense to try to
6 separate poultry waste that you hold in your hand
7 from what's in it. It's got constituents.

03:52PM

8 Everything is made up of stuff.

9 Q Okay. What I'm trying to ask, I guess Farmer
10 Jones out in the field wants to know what he can do,
11 what he can spread on his field. He can spread
12 poultry waste. He's being regulated on the basis of
13 poultry waste. This is the definition of poultry
14 waste.

03:52PM

15 A This is the definition of poultry waste in
16 this Act.

03:52PM

17 Q Okay, and I'm asking where else would Farmer
18 Jones go for these other issues that you're
19 referring to?

20 A What do you mean where else would he go?

03:53PM

21 Q Well, you're talking about the phosphorus;
22 you're talking about nitrogen. What would he rely
23 on -- he wants to comply with the letter and spirit
24 of Oklahoma law. What does he need to do to do that
25 and land applying poultry litter?

03:53PM

1 A No runoff makes it simple.

2 Q Okay. Where is that requirement?

3 A It's the requirement that the facilities don't
4 run off in the statute. Should be no discharge of
5 poultry waste to the waters of the state.

03:53PM

6 Q Where are you reading that?

7 A I'm sorry. I should have told you that. I'm
8 in Section 10-9.7. It's the section entitled
9 Utilization of Best Management Practices and Animal
10 Waste Management Plans, and it's Subsection B at the
11 beginning of the top of the next page.

03:54PM

12 Q Okay. How does Farmer Jones know whether
13 there's runoff from his application of poultry
14 litter?

15 A He can test downstream. He can rely on the
16 Oklahoma Cooperative Extension Service for technical
17 assistance to make those determinations. He can
18 rely on NRCS to assist him in making those
19 decisions. If he is as proactive as you are saying
20 that he is and he wants to go out and follow the
21 letter of the law, then he would get involved with
22 each and every one of these resources that are
23 available to him.

03:54PM

03:54PM

24 Q Test downstream, what are you referring to
25 there?

03:54PM

1 Q Okay, and a spring in the middle of my field,
2 is that something that would be taken into
3 consideration in my animal waste management plan?

4 A It would, but it's a matter of is it an annual
5 stream, is it year round, does it always have flow 04:03PM
6 or is it only certain times of the year, and is that
7 all taken into account, and then are there certain
8 times of the year after a big rainfall in another
9 area of the state that infiltrates groundwater, does
10 it come up through that field and create a runoff 04:03PM
11 problem from that site. I mean, there's just so
12 many different ways that it can occur.

13 Q Okay. We need to change tapes. We'll take a
14 little break.

15 VIDEOGRAPHER: We're now off the Record. 04:03PM
16 The time is 4:03 p.m.

17 (Following a short recess at 4:03 p.m.,
18 proceedings continued on the Record at 4:15 p.m.)

19 VIDEOGRAPHER: We are back on the Record.
20 The time is 4:15 p.m. 04:15PM

21 Q Miss Gunter, before we went on break, we were
22 talking about this Paragraph 7C in the regulations.
23 You've given several examples. Would you agree with
24 me that there has to be a violation of the animal
25 waste management plan before there can be a runoff 04:16PM

1 in this as --

2 A No.

3 Q No. So your testimony is I can -- Farmer

4 Jones, he can observe everything that's required of

5 him in his animal waste management plan and he can

04:16PM

6 still be in violation of this Paragraph C?

7 A The animal waste management plan is one piece

8 of the statutory requirements, and there are many,

9 many, many requirements in that animal waste

10 requirement plan. However, throughout the statute

04:16PM

11 there are also things regarding -- for example, look

12 at the BMP section that we talked about a second ago

13 in the statute on the 10-9.7, no discharge of

14 poultry waters to waters of the state. No waters --

15 well, there's a given, but poultry waste handling,

04:16PM

16 treatment, management and removal shall not create

17 an environmental or a public health hazard, not

18 result in the contamination of waters of the state

19 and conform to such other handling, treatment,

20 management and removal requirements deemed necessary

04:17PM

21 by the department. Again, in the statute under C6C,

22 poultry waste shall only be applied to suitable land

23 at appropriate times and rates. Discharge or runoff

24 of waste from the application site is prohibited. I

25 mean, all of those things work together to create

04:17PM

1 the provisions that Farmer Jones has to comply with.

2 Q Okay. How does Farmer Jones comply with all
3 of those if it's not the animal waste management
4 plan?

5 A He's extra careful and he evaluates his field 04:17PM
6 and he looks at them, and if he can -- the waste
7 management plan is a ceiling in many cases. There's
8 all kinds of level you can land apply at that don't
9 have to be as much as the waste management plan says

10 at every occasion. You can ratchet that down, and 04:18PM
11 you can land apply a little whenever you think it's
12 a time of year that may not be your best time of
13 year that runoff can occur. You can take all kinds

14 of steps in addition to your plan. I mean, your
15 plan is let's do this, but it's you better not do 04:18PM
16 beyond this as far as application and things like
17 that go, but there's a million levels below that a
18 responsible farmer, as the farmer you described, can
19 look at, and if he wants to say, okay, well, my

20 waste management plan says I can do this, but my 04:18PM
21 soil test, for example, at the bottom, OSU says
22 don't go above 65. Okay. I'll not go above 65

23 because that's the plant utilization, that the crops
24 might not take up more than that. So if I'm going
25 to be over the top careful and not create an 04:19PM

1 environmental or public health hazard, not create
2 runoff, I'm more likely to be better off if I use
3 that requirement or that suggestion from the soil
4 result.

5 Q Okay. Does the OSU soil sample test, do those 04:19PM
6 have the effect of law?

7 A You have to prepare your waste management plan
8 taking into account the soil test results.

9 Q Okay, but the OSU soil sample tests results
10 that I've seen have N, P and K and it has -- 04:19PM

11 A And results for that specific field.

12 Q -- a recommendation. Does that recommendation
13 have the effect of law?

14 A The recommendation on it is one of the things
15 that's taken into account in the plant, and it's 04:19PM
16 information for the farmer to take into account to
17 ensure compliance, but the -- where is it? Where am
18 I looking? Let me look at my rules for a second.

19 There's something that talks about it. It includes
20 all nutrient analysis data, including soil and 04:20PM
21 poultry waste testing, and I'm talking about
22 17-5-5A3. So that document is incorporated as a
23 part of your animal waste management plan.

24 Q Okay. Does the recommendation that appears on
25 that soil sample test, does that trump what it says 04:20PM

1 you can apply in your animal waste management plan?

2 A No. It's one of the many factors that you

3 look at in the -- a plan is not rote, thou shalt do

4 this, that shalt do this and you'll never have a

5 problem. A plan is just exactly what it says. It's

04:20PM

6 a plan. Here's guidelines. Here's things you need

7 to take into consideration. Yes, you're required to

8 take these things into consideration whenever you

9 are doing your land application but, again, it's

10 very similar. You don't want to exceed what they

04:21PM

11 recommend in that plan, but all of that

12 documentation should be taken into account by the

13 individual producer when they're making sure they're

14 in perfect compliance with the entire law.

15 Q Okay. My question still remains, how do they

04:21PM

16 know if they're in compliance with the entire law?

17 You testified just a moment ago that there are a

18 million levels below this animal waste management

19 plan ceiling.

20 A I keep using a million, don't I?

04:21PM

21 Q Yeah.

22 A It's a good number I guess.

23 Q At what point -- how do I know if I'm in

24 operation and I've got this animal waste management

25 plan, at what level of these million levels do I

04:21PM

1 know --

2 MR. LENNINGTON: Objection to form.

3 Q -- am I in violation of all of these laws and
4 regulations?

5 A You can ensure that if you do the sampling. 04:22PM

6 You can go above and beyond all of these things, any
7 of the basic requirements listed in your plan. You
8 can do -- you can get additional education. You can
9 get someone to come out from the extension to give

10 you additional guidance. You can go to NRCS and ask 04:22PM
11 for additional guidance, I mean, beyond what they
12 put together in their plan. All of these things are
13 free services that are provided to farmers in

14 virtually every county in the country. You can
15 go -- you've got your soil test results. He looks 04:22PM
16 at those soil tests results. He sees that

17 recommendation and says, hey, okay, that's another
18 way I can maybe ensure because I know that's lower
19 than this number, but I want to ensure that I'm in
20 compliance and don't have any runoff. You put in 04:22PM

21 grass buffer strips, all of those kinds of things
22 that you choose to do. I mean, you are talking
23 about the quintessential farmer that wants to do
24 everything perfectly, and he can do his own sampling
25 and make adjustments if he wants to or he can work 04:23PM

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1 with an entity to do his own sampling downstream --
2 above and down, and he'd have results that he could
3 see if he's contributing and, I mean, that's just
4 another tool that is available to him.

5 Q Okay. To do his own sampling?

04:23PM

6 A Yes.

7 Q Okay. Up and downstream?

8 A It's possible.

9 Q Okay. What does the State of Oklahoma do to
10 verify or to determine whether an owner or operator
11 of a poultry facility subject to the Registered
12 Poultry Feeding Operations Act is in violation of
13 this Paragraph 7C or any of these other provisions
14 that you've specified?

04:23PM

15 A Our minimal starting point is look at the
16 plan, look at their land application records, look
17 at their soil test records, look at their litter
18 analysis records.

04:23PM

19 Q Okay, and how can you tell whether there's
20 runoff if you look at the animal waste management
21 plan?

04:24PM

22 A Then you compare that to -- you compare that
23 waste management plan to all the record keeping that
24 they've done. As a whole, you do a site inspection.
25 It's not something obviously that you can do just in

04:24PM

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1 Registered Poultry Feeding Operations Act?

2 A A lot of different people.

3 Q Okay. Let's not talk about a lot of different

4 people. We talked about a lot of different people

5 in Exhibit 18, the list of people you have. Who is

02:42PM

6 authorized under Oklahoma law to write an animal

7 waste management plan that's required by the

8 Oklahoma Registered Feeding Operations Act?

9 A Well, the statutes or rules actually say that

10 NRCS drafts the plans or an entity approved by the

02:43PM

11 department.

12 Q Okay. Is there an entity approved by the

13 Department of Agriculture other than NRCS that

14 writes plans?

15 A We have had several people approach us about

02:43PM

16 it, but none ever actually submitted paperwork or

17 actually submitted any plans as a portion of it.

18 It's NRCS.

19 Q Okay, and we talked about a grant program

20 yesterday. Would some of those plans be written by

02:43PM

21 ODAFF employees for NRCS?

22 A Yes. We've got a cooperative agreement with

23 NRCS that -- and I don't know what you know, but the

24 NRCS trains technical service providers to draft

25 plans on their behalf, as well as their own staff to

02:44PM

1 draft plans, and we have -- I think we have six
2 people that have taken the training as technical
3 service providers pursuant to that, and once they
4 were all certified, NRCS had the grant and asked --
5 had the money for the grant and there were

02:44PM

6 discussions back and forth about whether or not we
7 could draft those plans as NRCS technical service
8 providers through a contract and ultimately all of
9 the issues were worked out and the -- and so we have

10 staff members that either part time or full time

02:44PM

11 contracted. They're all contract employees. None
12 of them are actually FTEs with the agency. We'll
13 draft those plans and prepare them, and I believe
14 the way the process works is they prepare two

15 copies. They mail them both to NRCS. NRCS

02:45PM

16 distributes them to the grower, and then the grower
17 would then send their extra copy of the plan back to
18 the department because they're required to have that
19 in their file, the updated plan.

20 Q Okay. I think you answered one of my next

02:45PM

21 questions in that explanation. So thank you.

22 During the annual inspections that are performed by
23 the poultry inspectors, do they evaluate the animal
24 waste management plans for effectiveness?

25 MR. LENNINGTON: Object to the form.

02:45PM